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I am touched, Chair, by the invitation to deliver the keynote address at your meeting. A keynote address is supposed to set the key for the occasion. It should be filled with wisdom and jurisprudential philosophy. However, I imagine that most of you would prefer an address that sounds more like background music – allowing you to ignore it and to enjoy your wining and dining. Therefore, if what you are about to hear is not set in the A Major key but rather in F Minor, consider that I am not only hard of hearing, I am also tone deaf.

Garp, the main character in John Irving's novel, "The World according to Garp", had two uncles. The book, by the way, is about lunacy and sorrow – very much like both the practice and the study of law. In any event, they believed that the study of law is sublime but that its practice is vulgar. This was more or less what our one professor taught us. Accepting his premise, I began my professional career in academia. I had some real academic pretensions.

My delusions were soon shattered. After the first semester's exams it appeared that one of my classes had the lowest average of any subject at the university, even lower than those in physics. What saved me was that my predecessor had similar results the previous year – and he was at the time deputy principal. I left the university after one year to try my luck elsewhere.

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Forty-two years later, I tried again. This time I presented a master's course for students from a number of African countries, funded by a UN agency. Came exam time, only one student passed. The reason: she was from Sudan and I could not read her paper. I was unsure whether she had used Roman or Arabic script, or a combination – and I was concerned about a request for a remark. By the way, our Department of Justice refers to the Roman alphabet as the English alphabet.

Let me not dwell on my academic disability. I have learnt that although the study of law is sublime its practice is not all that vulgar; and that there is a symbiotic relationship between study and practice. On this relationship I would like to focus. There is only one problem and that is to visualise the symbiotic relationship. It raises visions of sharks and pilot fish. There are different explanations of their relationship. The one is that the pilot fish gets food and the shark gets clean teeth. The other is that the pilot fish leads the shark to food and gets in return some scraps. Who in our relationship is the shark and who the pilot fish? Although judges sometimes nibble on the scraps left by academics in their writings, there is on balance a problem with the comparison: a shark does not eat pilot fish but, oh dear, one cannot say that academics do not devour judges.

When I studied, most of my lecturers were part-time. They were otherwise practising at the bar. I, too, was an advocate-lecturer for a number of years although the particular law faculty refuses to acknowledge the fact. To name some, also antedating my years, of whom I know: Schreiner, Rumpff, Jansen, Corbett, Trengove, CP Joubert, AS Botha, Nicholas, LWH Ackermann, FH Grosskopf, K van Dijkhorst, Joos Hefer, W Vivier. Quite an impressive list, albeit incomplete. It dates me and indicates my geographical origins. I should add Peter Hunt, who was from Pietermaritzburg and died early. He once acted as junior to Feetham in the AD against Shaw. Feetham announced that he was appearing with Dr Hunt. Shaw's riposte was that he was appearing on his own - without any medical assistance.

Universities moved on; student numbers became too important or too large; and the practice came to an end. Advocate-lecturers had their disadvantages but these were, I believe, far outweighed by the advantages. The academic ivory tower had some added windows.

Related to this was the fact that at city universities like Wits and Tuks nearly all LLB students were part-time students. The lectures were in any event always after office hours.

Another important phenomenon was the number of academics who in due course joined the bar and thence, after a substantial practice, became judges, such as Rabie CJ who was a professor in Latin. Colleagues of mine at the AD and SCA who had followed this career path include HJO van Heerden, PM Nienaber, PPJ Olivier and, latterly, Edwin Cameron. Then there are those from academia who have joined us more recently like Carole Lewis and Belinda van Heerden. It may not be without significance that those with this kind of background have climbed the judicial ladder. Their contribution, also in the background, has always been of incalculable value. They have brought a certain level of intellectual discipline and depth to our judgments. I, on the other hand, am of the Rumpole School: we tend to live by the idea that once one has the facts the law will look after itself.

Moves, at least temporary ones, from academia to practice have not always worked for all. Prof JC de Wet was proud to tell his students of the occasion during the early 1950s when he had taken leave to appear in the AD – and that he had earned a fee of 10 000 guineas. By the way, guineas were an invention of Isaac Newton when he was the head of the Mint. The case was *R v Milne & Erleigh*. The accused had salted a mine with gold. They were charged *inter alia* of theft. Having spoken to his former students, I gained the impression that JC did not tell the full tale. As related to me this is what happened. After their conviction JC wrote to the accused, offering his services. He believed that he had a point the advocates had overlooked: one cannot steal a share because it is an incorporeal. The advocates were not impressed with the point and so the appellants insisted that JC be briefed to argue it. As he rose to argue the point,

one of the judges asked him what the charge sheet had said. He had not read the charge sheet. The charge was one of theft of share certificates – and not of shares. The law reports contain a lengthy summary of JC's argument on the point but the judgment itself does not even mention it! Maybe there is merit in determining the facts first – maybe the law will look after itself.

Using Prof de Wet as an example, there are two further matters on which I would like to touch. The first concerns the tone of his criticism of judgments with which he disagreed or even agreed. Ogilvie Thompson CJ once made the obvious point that although judges appreciate criticism of and comment on their judgments, vulgar abuse does not convince and carries no weight. Ismael Mahomed CJ repeated the point many years later in more eloquent terms. I have never encountered a case where a court has criticised an academic in the same terms as we have to suffer from time to time. The stage should not be reached where the symbiotic relationship becomes parasitic, where you need us to give bad judgments in order to have something to write about.

The second relates to the judgment of Baker J in *Randbank v de Jager*. It concerned the common subject of suretyship and prescription, hardly a subject to expose you to tonight. But that is not the point of my story. De Wet had a view about the matter which was that Justinian had it all wrong and, so too, Johannes Voet. In fact, the matter was covered by the Prescription Act – drafted by de Wet himself – but that did not change his views. Baker J liked the conclusion but he did not know how to reach it. So he called on de Wet for assistance. As Maisels QC later noted, de Wet acted as Baker J's moderator. The issue came up from time to time in our court but was always left open. This irritated me and I then wrote an article under a pseudonym, criticising the Baker-de Wet view. Shortly thereafter the issue came squarely before the SCA. I was not involved but some of my colleagues guessed that it could only have been Nienaber JA or I who would have written the article, why I do not know. Nienaber JA (who, by the way, taught me in my first year) denied any involvement – which left me. The SCA reached the same conclusion as I had but, just to score a point, did so for somewhat different reasons. I relate this to illustrate the danger if the symbiotic relationship between us becomes

incestuous. When a pilot fish and a shark mate the offspring will have dirty teeth and nothing to eat with them. If a judge asks for assistance, please give it, but keep the judge at a safe and disrespectful distance.

JC van der Walt, before he became besotted with the law of delict, wrote an article on enrichment. I used his argument as the basis of the first exception that I drew at the bar. When the judge, Colman J, asked me on what authority I relied, I said JC van der Walt. He then asked: "And who is this Van der Walt?" I explained, although I omitted to state that we had been colleagues as research assistants. The judge then said: "And why must I believe him?" He dismissed the exception. The judge may have been right in the result, but I had a difficulty with his dismissive approach. Since then I have, if accessible, tried to refer when at all appropriate to academic articles, even if I disagree with them. However, many judges ignore your work. It may be because of ignorance, or because they had not been mentioned by counsel, or that they do not know of the search machines available. I recently wrote a judgment which you may have not read, either because it is about servitudes or because it was written in Afrikaans. In any event, a simple *Sabinet* search picked up two short notes by Prof Scholtens in the *Annual Survey* that were directly in point and on which I could thankfully rely. It also dredged up an article by my old Prof van Warmelo in *Acta Juridica*, which I was able to state, gleefully, was wrong. All I wish to say is that without search engines and without academic input the judgment would have been poorer.

This leads me to another issue: that of publish or perish. I was a member of the board of the *THRHR* from 1974 until this year. At the time we paid for contributions: R1 per page and 50c per half a page. There was no state subsidy. And we had about 2000 subscribers. Now there is a subsidy – quite substantial – for each contribution and we have less than 300 paying subscribers. The numbers keep dwindling. And we have, after the *SALJ*, the largest number of paying subscribers. The *THRHR* survives at the mercy of its publishers. You all wish to publish in accredited law journals. You have to. I am tempted to ask of you by means of a show of hands: who subscribes to a law journal? But I fear that the count, if any, would be embarrassing. Journals are

all in crisis, not only because of the invasion of the Internet and the proliferation of journals, but particularly because natural scientists are grading them using measures appropriate to their sciences and not to humanities.

There are a few problems with law journal articles – especially seen from the perspective of the bench. First, it is becoming difficult to recognise whether an article is a law article. Many belong in social science journals. Second, and related to the first, some are rather mediocre, stating or restating the obvious. Third, the problem of repetition: so much is a rehash of what the author had said in her or his doctoral thesis or in a previous article, creating the impression that the author has not grown or that the subject has ossified. This may be due to over-specialisation.

The list grows. Subsidies have caused a flood of articles and lack of subsidies has led to the lack of contributions by academics to works such as *LAWSA* and the *Annual Survey* or the writing of textbooks. You may not realise it but, in spite of all its faults, *LAWSA* plays an important role in practice. You are doing yourself and the country a disservice by not volunteering to contribute. I trust that the *Annual Survey's* attempted resurrection will bear fruit but I panicked when the editors asked me to write the chapter on Administrative Law. Had I agreed, the ConCourt judges would have had a laughing fit.

Judges are also entitled to equal treatment under the Constitution. Something that annoys me is the selection of holy cows – judges who can do no wrong and whose judgments are uncritically hailed as chapters in another holy book. Holy cows are conspicuous, and tend to chew the same cud, while the poor water buffalo carry the yoke. Judgments are often assessed with reference to the result and sound bites, and not by their logic. In other words, what Max Weber would have referred to as formally irrational judging has become the acceptable norm: it is one not guided by general norms; it proceeds in either pure arbitrariness or jumps to a conclusion in a purely casuistic manner upon the emotional evaluation of the particular case. Some tend to forget that a founding value of the Constitution is the rule of law and not the rule of judges. And that, as the Indian Supreme Court once said, "legalese and logomachy

have the genius to inject mystique into common words, alienating the laity . . . from the rule of law". The court did not notice the irony of its statement. I did not know that 'logomachy' is an argument about words – but maybe the laity do know.

The most important issue is the lack of representivity in law journal articles; and in *LAWSA*; and in textbook writing; and in the *Annual Survey*. We expect that the judiciary should reflect the demographics of the country but our legal writing does not reflect even the composition of academia. I do not wish to dwell on the subject. The problem speaks for itself. The reasons and solution do not. I call on you to consider this issue and make yourself available. Writing is hard work but it is rewarding. The country wants to hear your voice and needs you.

In conclusion I am asking you a simple favour: make it a requirement for a doctoral degree that copies of the thesis be donated to both the ConCourt and the SCA library – and that it may not exceed the length of an average ConCourt judgment.